United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-7217

To be argued by
MARTIN C. SEHAM

United States Court of Appeals

For the Second Circuit

VANTAGE STEAMSHIP CORPORATION,
Plaintiff-Appellant,

against

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR PLAINTIFF-APPELLANT VANTAGE STEAMSHIP CORPORATION

SURREY, KARASIK, MORSE AND SEHAM
Attorneys for Plaintiff-Appellant
Vantage Steamship Corporation
500 Fifth Avenue
New York, New York 10036
(212) 239-7200

MARTIN C. SEHAM
FRED C. KLEIN
DONALD F. DEVINE
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

PAGE

United States Court of Appeals

For the Second Circuit

Docket No. 76-7217

VANTAGE STEAMSHIP CORPORATION,
Plaintiff-Appellant,

against

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,
Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

---

BRIEF FOR PLAINTIFF-APPELLANT VANTAGE STEAMSHIP CORPORATION

Statement of the Case

Plaintiff-appellant Vantage Steamship Corporation ("Vantage") appeals from a decision (1383a)* by the Honorable Thomas P. Griesa of the United States District Court for the Southern District of New York granting judgment dismissing its complaint against defendant-appellee National Maritime Union of America, AFL-CIO ("NMU").

* Numbers followed by the lower-case letter "a" in parentheses indicate references to pages in the Joint Appendix.

A contract (E1)* for the sale of a ship, the S.S. Barbara, from Commerce Tankers Corporation ("Commerce") to Vantage was frustrated by a provision in the industry-wide NMU collective bargaining agreement, to which Commerce was a party, requiring the purchaser to continue the NMU as the representative of the unlicensed seamen employed aboard the ship. Vantage, which had a collective bargaining agreement with a rival union, the Seafarers International Union ("SIU"), was unable, by force of its own labor contract and existing federal labor law, to accept the NMU as the labor representative. The NMU obtained an award in a labor arbitration pursuant to the collective bargaining agreement enforcing the clause in the collective bargaining agreement and enjoining the sale of the S.S. Barbara, and subsequently enforced this award by obtaining an injunction in the United States District Court for the Southern District of New York. Thereafter, this Court reversed the lower court's injunction and found the clause in the collective bargaining agreement in violation of the federal labor laws. In the interim, Vantage lost a valuable charter it had contracted for the S.S. Barbara, and was also found liable to Commerce in a commercial arbitration for the losses suffered by Commerce when the sale of the S.S. Barbara was not completed. Vantage brought this action against the NMU to recover damages for the loss of the charter, sums paid to Commerce pursuant to the commercial arbitration award, and related injuries. After trial, judgment in favor of the NMU dismissing Vantage's complaint was entered by the district court on April 16, 1976.

---

* Numbers preceded by the upper-case letter "E" in parentheses indicate references to the Exhibits volume.

Statement of the Issues Presented for Review

1. Whether the district court erred in holding that Vantage was not entitled to recover damages under the federal antitrust laws because the proximate cause of its damages was the district court's injunction, not the actions of the NMU.

2. Whether the district court erred in failing to grant judgment for Vantage for damages resulting from the NMU's violation of §1 of the Sherman Act.

3. Whether the district court erred in holding that Vantage was not entitled to recover damages for the wrongful injunction obtained by the NMU because no bond was posted in favor of Vantage.

4. Whether Vantage is subrogated to the rights of Commerce against the NMU for the sums paid by Vantage to Commerce pursuant to the commercial arbitration award for damages suffered by Commerce as a result of the failure to complete the sale of the S.S. Barbara.

Statement of Facts*

On December 23, 1970, Vantage and Commerce entered into a contract (E1) for the sale of an ocean-going tanker, the S.S. Barbara, from Commerce to Vantage for a price of $2,750,000, with a delivery scheduled by February 28, 1971 (293a, 1313a). On January 25, 1971, Vantage entered into a contract to charter the S.S. Barbara to the Standard Oil

* The parties entered into stipulations on findings of fact and the chronology of events, reproduced at 286a and 1310a, respectively.

Company of California (the "SoCal charter") (E147) for a period of one year, with the charter to begin on March 5, 1971 (1314a).

Unlicensed seamen employed by Commerce aboard the S.S. Barbara (and another vessel owned by Commerce, the S.S. Thalia) were represented by the NMU (288a). Unlicensed seamen employed by Vantage aboard its fleet of ships were represented by the SIU (289a). After the sale of the S.S. Barbara was publicly announced (293a, 1314a), the NMU demanded of Commerce and Vantage that Vantage, as purchaser, accept the NMU as the labor representative of the unlicensed seamen employed aboard the ship, pursuant to Article I, Section 2 (the "restraint-on-transfer clause") (E18) of the industrywide NMU collective bargaining agreement, to which Commerce was a party (293a-295a, 1314a); this clause prohibited the sale of an NMU-contracted vessel unless the purchaser accepted the NMU and its collective bargaining agreement. Since Vantage already had a labor agreement with the SIU, the NMU's archrival, it was unable by force of that contract and the "fleetwide rule" of the National Labor Relations Board ("NLRB") as set out in *Moore-McCormack Lines, Inc.*, 139 N.L.R.B. No. 70, 51 LRRM 1361 (1962), to accept the NMU as the representative of the unlicensed seamen to be employed aboard the S.S. Barbara.

On February 8, 1971, a labor arbitration was held between the NMU and Commerce pursuant to the NMU collective bargaining agreement (295a, 1315a). The arbitrator's award (E16) enforced the collective bargaining agreement and enjoined the sale and transfer of the vessel without compliance with the restraint-on-transfer clause.

Vantage was not a party to the labor arbitration (296a), and the arbitrator disavowed consideration of the legality of the restraint-on-transfer clause. The arbitration lasted only some 20 minutes, there were no witnesses or other evidence submitted, no briefs were prepared, and the arbitrator issued a two-page decision the same day (Testimony of Kenneth Simon, Commerce attorney, 362a-365a).

On February 9, 1971, the NMU began an action (1a, 5a, 60a, 64a) against Commerce in the United States District Court for the Southern District of New York, case no. 71 Civ. 582, for confirmation of the arbitration award and obtained a temporary restraining order (5a) against the sale of the S.S. Barbara from Judge Inzer B. Wyatt upon the posting of a bond (17a) of $10,000 (296a, 1315a). On February 16, 1971, Vantage intervened (8a, 10a, 19a, 87a) in that action as a defendant (296a, 1316a), and also filed unfair labor practice charges against the NMU and Commerce with the NLRB (297a, 1316a). On February 19, 1971, Judge Wyatt issued a decision (55a) vacating the TRO upon the condition that a bond be posted in the amount of $278,000 by Commerce and Vantage covering pension contributions to the NMU and upon the filing of a separate undertaking by Vantage to put the NMU in the same position it would have been in if, on determination by the NLRB, the restraint-on-transfer clause was not found to be illegal (1316a); on February 22, 1971, Judge Wyatt signed an order (79a) to that effect (296a, 1317a). Vantage filed the separate undertaking (58a) required by Judge Wyatt on the same day (1317a), but was not able to raise its half of the $278,000 bond by the next day (1317a), and on that day, Judge Marvin E. Frankel, after

oral argument on the NMU petition for the confirmation of the arbitration award, orally restored the TRO (297a, 1317a); a written TRO (82a, 84a) was issued on February 23 (1318a). On March 2, Judge Frankel issued a decision (92a) granting a preliminary injunction against the sale of the S.S. Barbara to Vantage or any other purchaser without compliance with the restraint-on-transfer clause (1318a), and on March 4, he signed an order (111a) to that effect (297a, 1318a). *National Maritime Union of America, AFL-CIO* v. *Commerce Tankers Corporation*, 325 F.Supp. 360 (S.D.N.Y. 1971). An order to show cause (113a, 114a) to resettle the order was denied (134a) by Judge Frankel on March 24, 1971 (1319a). Vantage appealed Judge Frankel's decision to this Court on April 1, 1971 (1320a) and Commerce appealed on April 2, 1971 (1320a).

The SoCal charter, which was due to expire on March 5, 1971 (1318a), was extended on a day-to day basis while Vantage attempted to devise some alternative means of fulfilling the charter (1318a). All attempts to do so were unsuccessful. On March 11, 1971, SoCal cancelled the charter (1319a), due to "union problems" (Testimony of Ralph Peterson, SoCal executive, 1272a).

After much urging by Vantage to expedite the investigation of charges filed two months earlier, the Regional Director of the NLRB issued a complaint against the NMU on May 24, 1971, charging the restraint-on-transfer clause violated §8(e) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §158(e), and stating his intention to seek an injunction against application of the restraint-on-transfer clause (1321a). On June 22, 1971, Judge

Thomas F. Croake of the United States District Court for the Southern District of New York issued a decision (159a) denying the NLRB's request for an injunction but indicating an intention to grant a motion by Commerce to vacate the preliminary injunction issued by Judge Frankel (1322a). After reargument, on July 15, 1971, Judge Croake issued a decision (183a) denying the NLRB's request for an injunction and denying Commerce's motion to vacate the Frankel injunction on the grounds of lack of jurisdiction to modify an interlocutory order as to which an appeal was pending (298a, 1323a). *McLeod* v. *National Maritime Union of America, AFL-CIO*, 329 F.Supp. 151 (S.D.N.Y. 1971). The NLRB appealed this decision to this Court on August 10, 1971 (1324a).

On March 22, 1972, this Court reversed the Frankel injunction and reversed Judge Croake's denial of the NLRB's request for an injunction (298a, 1326a). *National Maritime Union of America, AFL-CIO* v. *Commerce Tankers Corporation* v. *Vantage Steamship Corporation, McLeod* v. *National Martime Union of America, AFL-CIO*, 457 F. 2d 1127 (2nd Cir. 1972).

On May 16, 1972, the NLRB entered a decision and order finding the restraint-on-transfer clause in violation of §8(e) of the NLRA (299a, 1326a). *Commerce Tankers Corp.*, 196 N.L.R.B. No. 165, 80 LRRM 1198 (1972). On October 10, 1973, this Court rendered a decision enforcing the NLRB's order holding the restrain-on-transfer clause in violation of §8(e) (299a, 1328a). *National Labor Relations Board* v. *National Maritime Union of America, AFL-CIO*, 486 F.2d 907 (2nd Cir. 1973). On April 22, 1974,

a petition for a writ of certiorari on this Court's decision enforcing the NLRB order was denied by the United States Supreme Court (299a, 1328a). *National Maritime Union of America, AFL-CIO* v. *National Labor Relations Board*, 416 U.S. 970, 94 S.Ct. 1993 (1974).

During this same period, Vantage and Commerce took part in a commercial arbitration pursuant to the contract of sale to determine who would bear the losses resulting from the failure to complete the sale of the S.S. Barbara (299a, 1320a). On July 9, 1971, the commercial arbitrators, by a 2-1 vote, rendered an award in favor of Commerce and against Vantage for the full sale price of the S.S. Barbara, less any sum received upon its sale (300a, 1323a). On November 20, 1972, the Supreme Court of the State of New York issued a decision confirming the commercial arbitration award (300a, 1327a). On April 5, 1973, the Appellate Division, First Department, in a 3-2 decision, affirmed the Supreme Court's decision (300a, 1327a). *Vantage Steamship Corporation* v. *Commerce Tankers Corporation*, 41 A.D.2d 813, 342 N.Y.S.2d 281 (1st Dept. 1973). On May 31, 1973, while an appeal to the Court of Appeals of the State of New York was pending, Commerce and Vantage entered into a settlement (E9), releasing all claims against one another but each retaining and reserving all rights and claims against the NMU, and Vantage agreed to pay $700,000 to Commerce (300a, 1327a).

On May 1, 1972, the S.S. Barbara was sold by Commerce to Plaza Shipping, Inc. for a price of $700,000 (301a, 1326a).

Proceedings in the Court Below

On October 30, 1972, Vantage began the instant action (192a, 228a, 248a, 251a) against the NMU, Commerce and Vernitron Corporation ("Vernitron"), the parent corporation of Commerce, in the United States District Court for the Southern District of New York, case no. 72 Civ. 4619 (300a, 1327a). The action alleged violations of the federal antitrust laws, the New York antitrust laws and the federal labor laws; wrongful injunction; and tortious interference with contract by the NMU. Recovery was sought for damages for the loss of the SoCal charter; miscellaneous expenses for work done by Vantage in expectation of the delivery of the S.S. Barbara and in preparation for overhauling and modifying the S.S. Barbara for future use; the sum paid to Commerce pursuant to the commercial arbitration award; attorney's fees in connection with the various arbitration and legal proceedings; treble damages pursuant to the federal antitrust laws, and punitive damages.

Pursuant to the settlement between Vantage, Commerce and Vernitron on May 31, 1973, the action was discontinued on June 22, 1973 (262a) against Commerce and Vernitron (301a, 1327a).

This action was consolidated for trial with Commerce's action on its counterclaims (263a, 277a) against the NMU in the original action, case no. 71 Civ. 582. After trial before Judge Griesa in the district court in January 1975, the district court issued a decision (1383a) on March 31, 1976 which dismissed Vantage's complaint and awarded judgment in the amount of the injunction bond, $10,000, to Commerce for the wrongful injunction issued by Judge Frankel.

The district court denied judgment on Vantage's and Commerce's antitrust claims on the grounds that the proximate cause of the damage suffered was the Frankel injunction, not any action by the NMU; the court did not need to consider whether there was a *per se* violation of the federal antitrust laws or whether the labor exemption in the federal antitrust laws was applicable to exempt the NMU from any violation of those laws. The district court found there was a wrongful injunction, but limited Commerce's recovery to the amount of the bond and denied recovery to Vantage on the grounds there was no bond running in favor of Vantage. All other claims of Vantage and Commerce were also denied. Judgment (1474a) was entered dismissing Vantage's complaint on April 16, 1976.

I

The district court erred in finding that the actions of the NMU in violating the federal antitrust laws were not the proximate cause of Vantage's damages.

The district court, without citing any authority, ruled that there could be no recovery under Vantage's antitrust cause of action under §1 of the Sherman Act, 15 U.S.C. §1, because, even if an antitrust violation occurred as alleged, it was not the proximate cause of the damage suffered; the preliminary injunction was the proximate cause of the damages, the district court ruled (1432a). In so ruling, the district court erred in several respects.

The district court rightly considered there was a need to make a finding of fact on the proximate cause of the damages suffered; but it erred by making this finding of fact

by employing principles applicable not to antitrust cases but to wrongful injunction cases. Proximate cause for an antitrust violation is based on the statutory requirement that the injuries occur "by reason of" the antitrust violation. 15 U.S.C. §15. This Court has stated the test as the need for "a causal connection between an antitrust violation and an injury sufficient for the trier of fact to establish that the violation was a 'material cause' of or a 'substantial factor' in the occurrence of the damage." *Billy Baxter, Inc.* v. *Coca-Cola Company*, 431 F.2d 183, 187 (2nd Cir. 1970), *cert. den.*, 401 U.S. 923, 91 S.Ct. 877 (1971).

Other courts have employed similar rules. "[A] plaintiff in an antitrust suit is not barred merely because factors other than defendant's unlawful conduct have contributed to its injury." *Ford Motor Company* v. *Webster's Auto Sales, Inc.*, 361 F.2d 874, 885 (1st Cir. 1966).

Applying these principles of proximate cause to this case, one would have to find that the actions of the NMU in executing and enforcing the restraint-on-transfer clause were a proximate cause of Vantage's damages. The injunction of the district court was not the sole creation of the court; it was the consequence of the NMU's illegal actions and clause.

Another test used to interpret the statutory requirement that the injuries occur "by reason of" the antitrust violation is the "direct injury" or "target area" test. The right to recovery is given to those persons "as might be injured in their business or property *by reason of* anything forbidden in the antitrust laws." (Emphasis in original text.) *SCM Corporation* v. *Radio Corporation of America*, 407 F.2d 166, 171 (2nd Cir. 1969), *cert. den.*, 395 U.S.

943, 89 S.Ct. 2014 (1969). A plaintiff may recover if he "can plead, and establish by proof, the causation required by the statute." *Ibid.* This Court has consistently recognized the right to recover of persons who are directly injured because they are the target of an antitrust violation. *Calderone Enterprises Corporation* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2nd Cir. 1971), *cert. den.*, 406 U.S. 930, 92 S.Ct. 1776 (1972). Vantage, and other potential buyers of vessels, were the targets at whom the restraint-on-transfer clause was aimed, *i.e.*, they were the persons who were to be affected and who were to be required to take affirmative action by accepting the NMU as the labor representative of unlicensed seamen aboard the purchased vessel.

In denying recovery to Vantage, the district court did not employ any of these rules. Rather, it applied rules appropriate to a wrongful injunction case. Citing no authority, the district court followed the injunction bond rule in this case, adopting the *damnum absque injuria* approach (1434a). We believe that approach is generally unsatisfactory even in wrongful injunction cases and particularly inappropriate in this wrongful injunction case, as is set out in Point III, *infra*. However, there is a further reason why this approach is totally out of place in considering the antitrust violation here. The usual pattern in a wrongful injunction case is that plaintiff suspects defendant of illegal actions, obtains an injunction, which injunction turns out to be wrongful because defendant's actions were not illegal, and defendant claims damages for the intrusion in his affairs under a theory of wrongful injunction. The *damnum absque injuria* approach has traditionally been defended as appropriate in assessing plaintiff's blame on the grounds plaintiff has committed no separate wrongful action. *This*

is not the case here. Here, the NMU obtained the injunction based on and in furtherance of its own illegal actions in violation of the antitrust laws, and the *damnum absque injuria* approach is consequently inappropriate.

The district court did not discuss nor consider proximate cause in the antitrust context. Nor did it consider it in the usual tort context. For example, the NMU was an "active" cause which led to the damage; the NMU's actions were a "substantial factor" in producing the damage complained of; the ability to enforce the clause in summary arbitration and injunction proceedings, where even the suggestion of union trouble would likely disrupt a sale, was a "foreseeable consequence" of the execution of the restraint-on-transfer clause; the damage would not have occurred "but for" the restraint-on-transfer clause. By any test other than the *damnum absque injuria* test the actions of the NMU would have to be considered the proximate cause of the injury, and, for the reason stated above, that test is inapplicable to the antitrust cause of action. Vantage is entitled to full recovery of the damages it seeks.

The district court erred a second time in considering the injunction against the sale of the S.S. Barbara to Vantage as the sole reason for the loss of the SoCal charter; it did not consider the effects of the clause which arose wholly apart from the injunction and which prevented Vantage from obtaining a replacement vessel to fulfill the SoCal charter. After the injunction was issued, Vantage attempted to make alternative arrangements to save the SoCal charter by purchasing another ship to replace the S.S. Barbara in fulfilling the charter (Testimony of Philip Corletta, Vantage President, 1155a). This turned out to

be impossible, and the restraint-on-transfer clause must be seen as the major reason for this.

If the charter was to be performed by Vantage, the unlicensed seamen aboard the chartered vessel had to be provided by the SIU. Half or more of the ships in the U.S. market that Vantage might have purchased to fulfill the charter were under contract to the NMU, and bound by the restraint-on-transfer clause (Testimony of Eugene Spector, NMU Research Director, 1041a-1403a).* Presumably, the NMU-contracted owners were aware of the clause, and not anxious to violate it. Owners of fleets of ships had an interest in maintaining the integrity of the clause, in the interest of stabilizing pension contributions (discussed more fully in Point II, *infra*). Within the industry, news of the court battle spread quickly and no owner could be expected to risk becoming involved in a similar battle. In addition, the restraint-on-transfer clause provided for enforcement by strike as well, since paragraph (d) made the no-strike provision of the labor contract inapplicable in case of violation of the restraint-on-transfer clause. Thus, half or more of the ships in the U.S. market that Vantage might have purchased to fulfill the charter were unavailable to it because of the restraint-on-transfer clause, not because of the injunction itself. This is precisely the kind of anti-competitive evil that Vantage has insisted is the consequence of the restraint-on-transfer clause since the day it filed its complaint in this action.

---

* This is the essence of the antitrust violation, discussed more fully in Point II, *infra*. The restraint-on-transfer clause had the effect of creating a barrier between the two halves of the maritime industry and foreclosing the SIU half from purchasing ships from the NMU half.

Proving a negative—the unavailability of replacement ships—is a difficult task, and one not required of the injured party in a case such as this one. Rather, the wrongdoer has the burden. As this Court has stated, the injured party need not bear this difficult burden of proof, and "the wrongdoer shall bear the risk of uncertainty which his own wrong has created." *Klinger* v. *Baltimore and Ohio Railroad Company*, 432 F.2d 506, 516 (2nd Cir. 1970). This Court "require[s] the wrongdoers to bear the burden of proof on the issue of causality." *Ibid.* In view of the antitrust violation set out in Point II, *infra*, the NMU had the burden of proving its wrongdoing caused no damage, and it has failed to even attempt to meet this burden. Thus Vantage is at least entitled to full recovery of the profits lost on the SoCal charter.

II

The district court erred in failing to grant judgment for Vantage for damages resulting from the NMU's violation of §1 of the Sherman Act.

A. The NMU entered a contract combination or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, in violation of §1 of the Sherman Act.

The district court never reached the issue of whether the NMU had violated §1 of the Sherman Act, 15 U.S.C. §1 because it decided that Vantage's damages were not *proximately* caused by any violation that may have occurred. Had the district court considered this threshold question, it would have had to rule that the NMU did combine with owners of vessels employing NMU-affiliated seamen in a

collective bargaining agreement containing a clause—the restraint-on-transfer clause—providing for a group boycott against third parties—such as Vantage—and attempted to enforce and maintain that clause, all in violation of §1 of the Sherman Act.* The four elements necessary for a violation of §1 were present in this case.

Firstly, there were *at least two persons acting in concert.* The NMU and the owners of vessels employing NMU-affiliated seamen acted in concert by agreeing to the restraint-on-transfer clause for their mutual benefit. Specific agreement on the clause was reached between the NMU on the one hand and the Tankers Service Committee ("TSC") and the Marine Service Committee ("MSC"), the two large employer associations principally negotiating with the NMU on the other, with smaller independent operators such as Commerce merely having the labor contract imposed upon them by the NMU.

Secondly, the restraint involved restrained *trade or commerce.* The sale of ships constitutes commerce. *Anderson* v. *Shipowners' Association of Pacific Coast*, 272 U.S. 359, 47 S.Ct. 125 (1926); *Commerce Tankers Corp., supra.*

Thirdly, the trade or commerce was trade or commerce *among the several states, or with foreign nations.* The sale of ships is by nature interstate and foreign commerce. *Anderson* v. *Shipowners' Association of Pacific Coast, supra; Commerce Tankers Corporation, supra.*

---

* The NMU has never contended that the restraint-on-transfer clause did not violate the federal antitrust laws; its defense has always been that it is exempt from the antitrust laws by virtue of the so-called "labor exemption", discussed in Point II(B), *infra.*

Fourthly, the restraint was *unreasonable*. The restraint in the instant case was a group boycott, a concerted refusal by NMU-contracted owners to sell a ship to any person who would not accept the NMU labor contract. As a practical matter, this group boycott prevented the sale of a vessel to any owner having a collective bargaining agreement with the NMU's rival, the SIU. Group boycotts are so inherently anticompetitive that they are illegal *per se*, and a violation of §1 will be found, if the other three elements of a violation of §1 are present, without further examining the reasonableness of the restraint. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705 (1959); *Northern Pacific Railway Company* v. *United States*, 356 U.S. 1, 78 S.Ct. 514 (1958); *Fashion Originators' Guild of America* v. *Federal Trade Commission*, 312 U.S. 457, 61 S.Ct. 703 (1941).

B. The NMU is not exempt from the federal antitrust laws because it is a labor organization.

The district court, because of its finding on proximate cause, also did not reach the issue of whether an exemption was available pursuant to 15 U.S.C. §17 for the NMU's anticompetitive actions. However, it is clear that the so-called "labor exemption" of 15 U.S.C. §17 is inapplicable in the present case.

The federal antitrust laws on the one hand and the federal labor laws on the other suggest the possibility of conflicting legislative goals. The federal antitrust laws aim to prevent concerted action intended to exert control over the marketplace. The federal labor laws, meanwhile, aim to allow workers to take concerted action in order to achieve certain objectives recognized to be legitimate. The

legislative resolution of this conflict is §6 of the Clayton Act, 15 U.S.C. §17, which provides a *limited* exemption from the federal antitrust laws for labor organizations. It is generally stated that the test for the application of the labor exempton is a twofold test: (1) whether the action is in the union's self-interest in an area which is a proper subject of union concern, and (2) whether the action is acting in combination with a group of employers. *Intercontinental Container Transport Corporation* v. *New York Shipping Association*, 426 F.2d 884, 887 (2nd Cir. 1970). These two tests are discussed in turn below.

1. The union did not act in an area of proper union concern.

The restraint-on-transfer clause did not apply in an area of proper concern for the union. It was not concerned with the employer-employee relationship between the NMU and any contracted employer, but rather, reached out and had its primary effect on commercial transactions between a contracted employer and third party strangers.

The most recent U.S. Supreme Court case dealing with the labor exemption is *Connell Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 95 S.Ct. 1830 (1975), which held that, notwithstanding the union's self-interest in a so-called work preservation clause, the clause violated the federal antitrust laws because of its application outside the area of proper union concern. In *Connell*, the union sought and obtained an agreement from general contractors that they would only hire subcontractors having labor agreements with the union. In the instant case, the NMU sought and obtained

an agreement from shipowners that they would only sell ships to buyers having labor arrangements with the NMU and requiring the imposition of the NMU contract on potential buyers not covered by the NMU contract. In *Connell*, the Court found that the agreement violated §8(e) of the NLRA, 29 U.S.C. §158(e). In the instant case, it has already been found that the agreement violated §8(e). *Commerce Tankers Corp.*, 196 N.L.R.B. No. 165, 80 LRRM 1198 (1972), enforced *sub nom. National Labor Relations Board* v. *National Maritime Union of America, AFL-CIO*, 486 F.2d 907 (2nd Cir. 1973), *cert. den.*, 416 U.S. 970, 94 S.Ct. 1993 (1974). In *Connell*, the Court found the agreement, because of its operation and effect, was not immune from the federal antitrust laws notwithstanding the labor exemption in the antitrust laws. In the instant case, the operation and effect of the agreement were substantially the same as in *Connell*, and, consistent with *Connell*, immunity from the federal antitrust laws should not be granted, notwithstanding the claimed labor exemption.

In *Connell*, the Court stated: "Labor policy clearly does not require . . . that a union has freedom to impose direct restraints on competition among those who employ its members." 421 U.S. at 622, 95 S.Ct. at 1835. Like Local 100 in *Connell*, the NMU used "direct restraints" on a "business market." The "business market" was the market for the sale and purchase of ocean-going tankers, an identifiable market by virtue of the significant number of such vessels transferred each year; detrimental effects would also arise in the broader market for the carriage of commodities by tankers due to the restrictions on the sale and purchase of tankers. The nature of the "direct re-

straints" in *Connell* was described in detail by the Court, and the similarity of those restraints to those under the restraint-on-transfer clause can be dramatically seen by quoting *Connell*, with a substitution of names and identifications:

> "The agreements with Connell and other general contractors [Commerce and other companies] indiscriminately excluded nonunion subcontractors [non-NMU-contracted companies] from a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods. Curtailment of competition based on efficiency is neither a goal of federal labor policy nor a necessary effect of the elimination of competition among workers. Moreover, competition based on efficiency is a positive value that the antitrust laws strive to protect." 421 U.S. at [illegible] S.Ct. at 1835.

Prior to *Connell*, the leading cases on the labor exemption were the companion cases of *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 85 S.Ct. 1585 (1965) and *Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO* v. *Jewel Tea Company, Inc.*, 381 U.S. 676, 85 S.Ct. 1596 (1965), in which the nine Justices wrote five opinions; those of Justice White in each case were styled the opinion of the Court, though only two other Justices joined him in each opinion. These cases initially limited the labor exemption to areas which are of proper concern to a union.

Justice White's test as to whether a restriction advocated by a union is exempt from the antitrust laws depends on whether

> ". . . [the restriction] is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act." *Jewel Tea, supra*, 381 U.S. at 689-90, 85 S.Ct. at 1602.

Justice Goldberg in an opinion applicable in both *Pennington* and *Jewel Tea* advocated a rule that unions should be "exempt from the operations of the antitrust laws for activities involving subjects of mandatory bargaining". 381 U.S. at 735, 85 S.Ct. at 1627. But he qualified this to exclude agreements where the subject of the agreement is "anticompetitive commercial restraint at which the antitrust laws are directed." 381 U.S. at 733, 85 S.Ct. at 1626. Justice Douglas did not view the issue in terms of any area of union interest being exempt from the antitrust laws, but rather drew a line where concentrated power of business organizations—including unions—dominated markets and prices.

Under *any* of these tests, the restraint-on-transfer clause fails. It is *not* related to the wages, hours or working conditions of NMU seamen. It reaches beyond the collective bargaining relationship between the union and any contracted employer and attempts to make the NMU the dominant union in the market by restraining ship acquisitions to its contracted companies. This was dramatically demonstrated by the call of the NMU's Counsel, Charles Sovel, to Vantage's President, Philip Corletta, in January 1971 immediately after the NMU learned of the

proposed sale of the S.S. Barbara (1131a-1133a). Sovel's objective in a "heated" telephone call was to pressure Vantage into accepting the NMU, a position he insisted upon again and again. Having failed in this tactic, the NMU then resorted to the injunction, which it tenaciously enforced despite all offers to defuse and compromise the dispute.

The NMU's object was not work *preservation*, it was work *acquisition*. Sovel himself described the unit he was attempting to "preserve" work for as all NMU seamen (1303a). In other words, his objective was not to save the jobs of specific seamen sailing on the S.S. Barbara but rather to have their job opportunities remain in the hands of the NMU as an institution and in the hands of its contracted companies. Pursuing jobs for organizational control is not permissible work preservation under the federal labor laws; permissible work preservation actions are limited to those which preserve specific jobs for identified people. The federal labor law simply does not recognize the scope of the union's organization as being coextensive with the bargaining unit for employees. The labor exemption from the antitrust laws depends upon the union's pursuit of a legitimate objective such as the maintenance of adequate wages and conditions for employees *within the proper bargaining unit*. *Allen Bradley Co.* v. *Local 3, International Brotherhood of Electrical Workers*, 325 U.S. 797, 65 S.Ct. 1533 (1945). In the instant case, the National Labor Relations Board specifically found the restraint on transfer clause had an object outside the scope of the appropriate bargaining unit. *Commerce Tankers Corporation*, 196 N.L.R.B. No. 165, 80 LRRM 1198 (1972), as did

this Court. *N.L.R.B.* v. *National Maritime Union of America*, 486 F.2d 907 (2nd Cir. 1972), *cert. den.*, 416 U.S. 970, 94 S.Ct. 1993 (1974).*

One may trace the NMU's motivation in demanding the clause to its fierce rivalry with the SIU, its bitter rival (Testimony of Mel Barisic, NMU Secretary-Treasurer, 429a-430a; Herman S. Nathanson, Commerce President, 749a-750a, 754a, 915a-916a). The NMU has engaged in a battle with the SIU for dominance among unlicensed personnel. This rivalry is so acute that Shannon Wall, now President of the NMU, remarked of the S.S. Barbara and another Commerce ship that he would rather they "be lost foreign than be lost to the rival union SIU." *National Maritime Union of America, AFL-CIO* v. *Commerce Tankers Corporation* v. *Vantage Steamship Corporation, McLeod* v. *National Maritime Union of America, AFL-CIO,*

---

* The good faith and sincerity of the NMU's claims that the restraint-on-transfer clause was ever a legitimate effort at work preservation are thrown into question by the fact that the NMU, in January 1976, well over *two years* after this Court declared the restraint-on-transfer clause in violation of §8(e), invoked the clause against one of its contracted companies, Mathiasen's Tanker Industries, Inc. ("Mathiasen's") which was attempting to sell a tanker to an SIU-contracted company. Mathiasen's cancelled the sale as a result of NMU pressure. The NLRB filed a complaint based on the litigation in the instant case. The NMU, by its President, Shannon Wall, signed a stipulation settlement on April 1, 1976 in which it agreed to "cease and desist from entering into, maintaining, enforcing or otherwise giving effect to Article I, Sections 2(a) and (b) of its collective bargaining agreements" and to "cease and desist from directly or implicitly advising Mathiasen's or any other employer having a collective bargaining agreement with NMU, that Article I, Sections 2(a) and (b) . . . have been renewed in any successor agreement, or that such provisions otherwise had continued to be in force or in effect." *National Maritime Union of America, AFL-CIO and Seafarers International Union of North America-Atlantic, Gulf, Lakes and Inland Water District, AFL-CIO and Mathiasen's Tanker Industries, Inc.*, Case No. 2-CE-90, N.L.R.B., Region 2 (1976).

457 F.2d 1127, 1130 (1972).* (See also testimony of Herman S. Nathanson, Commerce President, 750a.) The restraint-on-transfer clause would have served the NMU in its basically institutional battle with the SIU to unionize more seamen, build up the union treasury and increase the union's influence, none of which fall within the legitimate union objectives previously described.

Another object of the restraint-on-transfer clause was to circumvent the fleetwide principle. The fleetwide principle was an established and recognized rule of maritime law, advocated at one time by the NMU's president** and con-

---

* This Court took note of the "intense" rivalry between the NMU and the SIU in that decision. 457 F.2d at 1130.

** Joseph Curran, the NMU's President in 1961, filed an affidavit (31a) in the United States District Court for the Southern District of New York in 1961 in litigation involving the NMU in which he advocated the fleetwide principle; the affidavit was an exhibit to the affidavit (19a) of D. David Cohen in support of Vantage's motion to intervene in case no. 71 Civ. 582. Curran stated in part:

> "There can be no question that in the maritime industry fleetwide representation by a single union is the prevailing and traditional rule; such unit is ordinarily the only appropriate unit; historically for most employers (whether under NMU, SIU or SUP [Sailors Union of the Pacific] contract) it has been the only unit that has been recognized.
>
> * * *
>
> "The maritime industry is a volatile one in which there is a constant stream of sales, exchanges, and other types of transfers of vessels among employers. To preserve the principle of fleetwide representation by a single union, indeed to preserve sanity in the industry, the rule inevitably followed is that the union with which an employer customarily deals is recognized automatically as bargaining representative for any newly-acquired vessels.
>
> * * *
>
> "For this reason, a practice of long standing has developed among existing maritime unions that whenever a change of ownership or control in a vessel occurs, the union which customarily deals with the transferee or acquiring operator automatically succeeds to the status of bargaining representative." (34a, 35a, 36a).

firmed in several cases in the 1960's involving the NMU.* It provided that all the ships of a single employer be manned by members of the same union, with newly purchased ships accreting to the owners' fleetwide unit. *Moore-McCormack Lines, Inc., supra.* The purpose of that principle was to bring peace to a strike-torn waterfront by eliminating inter-union rivalry with respect to similar employees of the same employer and a consequent diminution of conflicts which brought on work stoppages, and the facilitation of transfers of personnel between ships of the same employers and of ships between different shipowners. *Moore-McCormack Lines, Inc.*, 139 N.L.R.B. at 798-99, 51 LRRM at 1362. The restraint-on-transfer clause promised turmoil, and had every maritime union enacted a similar clause and sought to enforce it, labor battles would have erupted again on the waterfront. The free flow of commerce—which is the object of the antitrust laws and the labor laws alike—would have come to a crashing halt; instead, the two primary segments of the American maritime industry would have been walled within two separate trade ghettos.

Because of the NMU's improper motivation for the restraint-on-transfer clause, the instant case is an easier one to decide than *Connell.* In *Connell*, the union's goal—an organizing campaign—was legal, as the Supreme Court noted. In the instant case, the NMU's goal—acquisition of work, mostly from workers already organized by the SIU—was illegal, as the NLRB and this Court have already found.

---

* *Moore-McCormack Lines, Inc., supra; National Maritime Union of America, AFL-CIO (Overseas Carriers Corporation)*, 174 N.L.R.B. No. 36, 70 LRRM 1150 (1969); and miscellaneous unreported cases.

2. *The union acted in combination with employers.*

The heart of the antitrust laws is the concept that, while one may act alone in his economic interest, action in combination with others threatens to unbalance the normal dynamic of the market. Hence, when the NMU acted with improper objectives, as described in Point II(B)(1), *supra, and* did so in concert with a group of employers by joining in a mutually beneficial contract for the restraint on transfer, it violated the federal antitrust laws. A collective bargaining agreement can represent action by a union in combination with an employer which is the basis of an antitrust violation. *Pennington, supra.* In *Connell*, the action in concert was the agreement Local 100 coerced the plaintiff Connell Construction Company to sign. In *Jewel Tea*, the Court noted "that this case comes to us stripped of any claim of a union-employer conspiracy against Jewel," 381 U.S. at 688, 85 S.Ct. at 1601, but it decided the case on the basis of the objective sought by the union as contained in the multi-employer collective bargaining agreement plaintiff Jewel signed under the duress of strike.

While a legitimate union objective is a prerequisite for the application of the labor exemption, even that may result in an antitrust violation if illegal means are employed to attain the objective. "[T]here are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws." *Pennington,* 381 U.S. at 665, 85 S.Ct. at 1591. Consequently, even if the NMU's goal was only work preservation as it has long—and unsuccessfully—insisted, as the Supreme Court noted in *Connell* (again substituting names and identifications from the instant case):

> "[T]he methods the union chose are not immune from antitrust sanctions simply because the goal is legal. Here Local 100 [the NMU], by agreement with several contractors [owners], made non-union subcontractors [non-union buyers] ineligible to compete for a portion of the available work [purchase of a NMU-contracted ship]. This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policy to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws." 421 U.S. at 625, 95 S.Ct. at 1836.

Vantage, and every other SIU-contracted company, was *totally foreclosed* from that segment of the market represented by NMU-contracted companies. The existence of the restraint-on-transfer clause gave the NMU (again substituting names and identifications from the instant case)

> "... power to control access to the market for mechanical subcontracting work [the purchase of NMU-contracted ships]. The agreements with general contractors [NMU-contracting companies] did not simply prohibit subcontracting [sales] to any non-union firm; they prohibited subcontracting [sales] to any firm that did not have a contract with Local 100 [the NMU]. The union thus had complete control over subcontract work [sales] by general contractors [owners] who had signed these agreements. Such control could result in significant adverse effects unrelated to the union's legitimate goals of organizing workers and standardizing working conditions." 421 U.S. at 624, 95 S.Ct. at 1836.

This Court, in *William J. Burns International Detective Agency, Inc.* v. *National Labor Relations Board*, 441 F.2d 911, 915 (2nd Cir. 1971), *aff'd*, 406 U.S. 272, 92 S.Ct. 1571 (1972), held that the national labor policy does not justify ". . . imposing a collective agreement upon an unwilling party who had no part in the negotiation of the agreement." Thus, even in a non-maritime situation where a successor employer might be bound to recognize the union chosen by the employees of the predecessor employer, the successor employer would merely have the duty of bargaining with its predecessor's union. The successor employer would not be bound to honor the prior collective bargaining agreement.

This kind of total foreclosure from a segment of the market, the erection of a wall between NMU-contracted companies and non-NMU-contracted companies, is condemned by *Connell*, even if done in the name of a legitimate goal—which didn't even exist in this case.

The *Pennington* case also represented an instance where a union apparently acted to safeguard the wages of its members but acted to do so with employers in such an anticompetitive manner that an antitrust violation was found. In that case, the Supreme Court found the exemption forfeited where the union agreed with one set of employers to impose a certain wage scale on other bargaining units. The *same* situation occurred in the *Allen Bradley* case. It is therefore clear that a union motivation to secure improved wages, hours or working conditions for its members does not suffice to exempt union conduct from the antitrust laws where the union conspires with non-labor groups to impose such conditions upon an entire industry or upon competing employer outside the bargaining unit.

Pennington, 381 U.S. at 665-666, 85 S.Ct. at 1590-1591; *Allen Bradley*, 325 U.S. at 808-809, 65 S.Ct. at 1539. Whenever a union, although attempting to achieve its own end, makes an effort to insulate some employer from competition by others, such conduct violates the Sherman Act. *Jewel Tea*, 381 U.S. at 693, 85 S.St. at 1603.

This is precisely what occurred in the instant case. The restraint-on-transfer clause specifically provided that the purchaser of a vessel had to agree "for the full term of the Agreement all of its terms and provisions shall apply to said vessel . . . and that said business entity will fully comply with all of the terms and provisions of this Agreement and any amendments thereto. . . ." (E18)

The NMU restraint-on-transfer clause is thus only a subtle variant of the type of arrangement condemned in *Pennington*. In *Pennington*, the union agreed to impose a wage scale arrived at with certain employers upon all other mine operators. In the instant case, the wage scale and other labor conditions agreed upon between the NMU and NMU fleet owners—including particularly the pension contribution arrangement—were by agreement to be foisted upon the new owners of transferred vessels. In *Pennington*, the small operators who could not afford the wage scale forced upon them were being driven out of business. Here, non-NMU tanker operators would be foreclosed from even entering the market or from expanding their existing fleets through the acquisition of additional vessels unless they were willing and able (as, of course, SIU operators were not) to accept the labor agreements entered into by their NMU competitors. The NMU restraint-on-transfer clause is thus the type of anticompetitive arrangement that vio-

lates the antitrust laws, and, as the Supreme Court in *Pennington* noted, *without* regard to "predatory intention or effect":

> "From the viewpoint of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case. For the salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy. Prior to the agreement the union might seek uniform standards in its own self-interest but would be required to assess in each case the probable costs and gains of a strike or other collective action to that end and thus might conclude that the objective of uniform standards should temporarily give way. After the agreement the union's interest would be bound in each case to that of the favored employer group. It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy." 381 U.S. at 668, 85 S.Ct. at 1592.

The NMU, as noted *supra*, sought to achieve various goals by agreeing to the restraint-on-transfer clause; there were separate inducements for the NMU-contracted owners to consent as well. For instance, the clause enabled these owners to give the guarantee of pension fund payments the NMU so greatly desired. Pension fund contributions were made as a fixed sum per man-day of employment on NMU-contracted vessels. The restraint-on-transfer clause enabled the owners to set an upper limit on the pension liability to the the NMU and, at the same time, provided a device to keep the number of ships available to pay this

liability relatively stable.* Without the restraint-on-transfer clause, liability for the guarantee might have fallen on a declining number of ships, with resulting increases in the man-day rate (Admission of Charles Sovel, NMU Counsel, 1058a-1059a). Considering the guarantee was for $44 million per year, the owners had a significant interest in providing an element of certainty for meeting this huge liability.**

There were other benefits as well to the NMU fleet owners, including assurances that a competing ship operator who purchased an NMU vessel could not be able to operate the vessel with lower labor costs under a more favorable contract with either the NMU or any other union. To the extent vessels were sold foreign because the restraint-on-transfer clause foreclosed American buyers, they were removed from the lucrative U.S. coastwise trade—limited by law to U.S. flag vessels—thus leaving a bigger "pie" for the remaining ships to cut up, as noted by the

* The NMU was deeply concerned about the effects on its pension plan from the declining number of ships in the industry. Edward Silver, Counsel for the MSC and the TSC, testified about a meeting he participated in as a representative of the MSC and the TSC with NMU officers where this concern was the reason for the meeting (552a-556a). Eugene Spector, Research Director of the NMU, similarly testified as to the NMU's concern about the decline in jobs (990a, 1011a-1012a). The solution for the NMU was the guarantee (620a-624a). Charles Sovel, NMU Counsel, testified there was a "logical" connection between the restraint-on-transfer clause and the NMU's pension plan (1297a) and Judge Griesa also found the connection between the two "obvious" (1055a-1057a). The NMU explicitly acknowledged the link between the restraint-on-transfer clause and its pension plan in its petition for certiorari after this Court's decision finding the restraint-on-transfer clause illegal in *National Labor Relations Board* v. *National Maritime Union of America, AFL-CIO*, 486 F.2d 920 (2nd Cir. 1973), *cert. den.*, 416 U.S. 970, 94 S.Ct. 1993 (1974) (E160-E161, 1297a-1300a).

** Judge Griesa stated that the guarantee was "somewhat illusory" since the NMU forgave a deficiency in 1972 (1440a). But there was no way to know in 1969 when the guarantee was given that any deficiency would be forgiven.

NMU's present President, Shannon Wall (E117). Also, any potential seller of an NMU-contract ship had a highly restricted market, *viz.*, only other NMU operators or those willing to take the NMU (excluding, of course, all SIU operators); no doubt this lowered the sale price to the potential NMU-contracted purchasers.

The whole range of anticompetitive effects resulting from the restraint-on-transfer clause were summarized succinctly by the Federal Maritime Administration in its *amicus* brief to this Court in support of the NLRB's appeal for an injunction prohibiting enforcement of the restraint-on-transfer clause, *National Maritime Union of America, AFL-CIO* v. *Commerce Tankers Corporation* v. *Vantage Steamship Corporation*, *McLeod* v. *National Maritime Union of America, AFL-CIO, supra*:

> "Thus, for the NMU contracted operator, the effect of the clause is to depress the price of his ships and to encourage their sale abroad, especially when there is no prospective NMU buyer, as in this instance. The SIU or the other contracted company suffers other disabilities. For the larger, efficient, and successful American-flag operator, the existence of these clauses means that his selection of vessels for the purpose of expansion is necessarily limited by some 50 percent. It may mean that he cannot buy the ship he wants at the time he wants for operation under the American flag. Building a vessel is no alternative due to the expense and time required for construction. Instead, the larger operator may be faced with the real alternatives of either foregoing beneficial expansion or conducting his projected operations under a foreign flag.
>
> "Some short run and long run effects of the clause will be:

(a) Added loss of cargo by American-flag shippers to export and import by foreign flag. This will result in further reduction of dollar exchange savings to the United States;

(b) Increased operating costs for shippers who were forced to divert trade to other coasts by rail or truck in order to make contracted schedules;

(c) Loss of trade for ports;

(d) Deterioration of customer/shipper relationship due to increased delivery time. This may result in the transfer of a client's future business to other geographic areas of the United States or may even end in total cancellation of the U.S. as a source of supply in lieu of foreign sources;

(e) A deterrent to ship operators contemplating domestic and foreign oceanborne operations.

"The NMU states that it requires its employers to contribute 44.3 million dollars per year to its pension fund. If substantial numbers of American-flag vessels were to go under foreign flag, the increased cost of doing business imposed by increased contributions to the pension fund would drive smaller companies out of business or force them to foreign registry. This, in turn, would force greater contributions from the remaining employers and could have a devastating effect on the merchant marine."

In sum, the labor exemption from the antitrust laws should not apply for two reasons: (1) the NMU engaged in anticompetitive behavior (the execution of the restraint-on-transfer clause) for reasons unrelated to the legitimate interests of its members in concert with NMU-contracted owners, or (2) even if the NMU's motive had properly been work preservation, it may not arrive at that goal by direct restraints on competition.

III

The district court erred in finding that Vantage was not entitled to recover under a theory of wrongful injunction.

A. Vantage was entitled to recover from the NMU for damages suffered as a result of the wrongful injunction.

The district court found the injunction granted by Judge Frankel in this case was wrongful and granted relief limited to the amount of the bond* solely to Commerce. The district court found there was no bond in favor of Vantage and disallowed Vantage's claim, citing *Benz* v. *Compania Naviera Hidalgo, S.A.*, 205 F.2d 944, 948 (9th Cir. 1953), *cert. denied*, 346 U.S. 885, 74 S.Ct. 135 (1953) (1435a). The finding of the district court was merely that no bond existed which named Vantage as the beneficiary; the district court did *not* find that Vantage had no cause of action for wrongful injunction. Since the district court adopted the view that damages for wrongful injunction are limited by the amount of the bond, and since the only bond named Commerce as beneficiary, the district court denied recovery of a share of the bond to Vantage.

In *Benz*, *no* bond was given upon the issuance of an interlocutory injunction. Thus, when recovery was sought for damages alleged to have been suffered by the allegedly improperly issued injunction, the court denied recovery in the absence of a bond. This case is merely a statement of the view that damages suffered as a result of a wrongful

* The limitation on recovery for wrongful injunction to the amount of the bond is discussed in Point III(B), *infra*.

injunction are limited to the amount of the bond (the opposing view is discussed in Point III(B), *infra*). The court did *not* make any holding, and was not required to make any holding, as to which defendants had a cause of action for wrongful injunction where there were multiple defendants of perhaps different standing. The issue in *Benz* was *how much* should the recovery be.

Vantage intervened as a *defendant* in the action against the NMU and was an active participant in all phases of the litigation of the case. The fact that Vantage was not named on the bond was a result of the circumstances under which the case arose. The initial labor arbitration only involved the parties to the collective bargaining agreement, the NMU and Commerce. Subsequently, the NMU, in enforcing its award, obtained a temporary restraining order against Commerce, and the $10,000 bond deposited in court at the outset of this case in connection with the TRO named only Commerce. Immediately thereafter, Vantage intervened and became an active participant in the litigation. As such, the decisions and orders in the ongoing litigation were directed at it as well. When Judge Frankel granted the temporary injunction, he maintained the bond at $10,000, and the same bond remained in place. Changing the beneficiary on the bond was either overlooked or neglected as less than critical because of the small amount involved during the days of intense negotiation and maneuvering following Judge Frankel's decision. Thus, the failure to name Vantage on the bond was fortuitous rather than deliberate, and certainly did not reflect any intention that Vantage not be bound by the injunction. Vantage, as a defendant in the action, bound by and damaged by the injunction,

has a cause of action against the NMU for its wrongful injunction; the issue on which the district court erred was in determining the limits of recovery on this cause of action.

B. Vantage's recovery for damages for injuries resulting from the NMU's wrongful injunction is not limited by the amount of the bond posted by the NMU.

The district court erred in limiting recovery for the wrongful injunction obtained by the NMU to the amount of the bond posted. The district court relied on *In Re Spencer Kellog & Sons*, 52 F.2d 129 (2nd Cir. 1931), *rev'd*, 285 U.S. 502, 52 S.Ct. 450 (1932) (1435a), which did not involve the posting of a bond, and contains, at best, outdated dictum on wrongful injunction. As noted, the case was actually reversed on the issues it attempted to decide.

The district court disregarded Vantage's reliance on *United States Steel Corp.* v. *United Mine Workers*, 456 F.2d 483 (3rd Cir. 1972), *cert. denied*, 408 U.S. 923, 92 S.Ct. 2492 (1972), which held that damages in excess of a bond are recoverable under §7 of the Norris-LaGuardia Act, 29 U.S.C. §1107. The grounds of the district court's decision were that it could find no reference to §7 in the proceedings before Judge Frankel. This conclusion is insufficient for three reasons. Firstly, the court in *United States Steel* had no evidence either that the bonds in that case were granted under §7, and such evidence is obviously not critical to the reasoning permitting recovery. 456 F.2d at 489. Secondly, since the person seeking the injunction describes to a court the statutory authority for the injunction, recovery for wrongful injunction would depend on the fortuity of whether he referred to Rule 65 of the Federal

Rules of Civil Procedure or §7 of the Norris-LaGuardia Act where both might be applicable, which would be a totally unsatisfactory rule. Certainly the wrongdoer's procedural choices cannot be used to insulate him from liability for his wrongs. Finally, paragraph (e) of Rule 65 specifically provides that the Federal Rules of Civil Procedure "do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee"; thus if §7 of the Norris-LaGuardia Act provides for recovery of damages in excess of any bond posted, Rule 65 does not change that provision.

Vantage relies on *United States Steel* as a detailed and thorough analysis of the law in this area, reaching a sound and well reasoned conclusion. The court considered the *damnum absque injuria* approach advocated by the NMU and rejected it, finding a congressional intent to permit recovery for the full amount of damages and attorneys' fees, even in excess of any bond.

There is, of course, considerable authority limiting recovery for a wrongful injunction to the amount of the bond posted. There is a basic conflict between all such holdings and the purposes of the bond plaintiffs are required to post. The bond, by its definition and rationale, is designed for the benefit of the defendant, to protect him against damages for this intrusion in his affairs before a final court adjudication of the matter. The logic of the bond is that it is a guarantee for the *defendant* of payment of those damages. However, those courts which view the bond as the limit of recoverable

damages in effect view the bond as for the benefit of the plaintiff, as setting the upper limit on the "price" for the injunction. This latter approach could result in the unconstitutional deprivation of property without due process, as described by Commerce in Point III of its brief in the companion case and as applied to Commerce with respect to the sale of the S.S. Barbara. *United States Steel* properly interprets the purpose of the bond and represents the soundest, most logical authority.

It should be noted that Judge Frankel ruled against a request by Commerce that the bond on the preliminary injunction be increased to the full amount of the sale price of the S.S. Barbara (30a). In its opinion, the district court suggested that Vantage was subject to blame for not appealing to the Court of Appeals immediately to have the amount of the bond increased and/or for a review of the district court action (1424a-1428a). This contention ignores the actual status of the litigation at the time such action would have had to be taken.

In the first place, Judge Frankel's opinion was dated March 4, 1971. The SoCal charter, the loss of which comprises the main element of Vantage's damages, was due to expire the next day. The charter was kept alive on a day-to-day basis until March 11, when it was irretrievably lost. During this period, Vantage was thoroughly engrossed in attempting to make alternative arrangements to save the charter (Testimony of Herman S. Nathanson, Commerce President, 803a-814a, Testimony of Philip Corletta, Vantage President, 1153a-1170a, Testimony of Bernard Levine,

Commerce Chief Executive Officer, 1098a-1104a).* An appeal to the Court of Appeals when the charter could have been lost at any moment did not appear to be the most productive action at this time.**

Secondly, from the outset of this case Vantage particularly contended that the restraint-on-transfer clause violated the federal labor statutes. It was apparent that the authoritative interpretation of §8(e) of the NLRA would have to come from the NLRB. The issues involved in Judge Frankel's actions, the rulings on federal law he erroneously made, and any appeal therefrom were the very issues already pending before the NLRB. The interests of

* The intensity and complexity of the situation immediately before and after the Frankel decision should not be underestimated. Vantage and Commerce were in constant communication during this period, both to consider the case against the NMU and to attempt to save the SoCal charter. Likewise Commerce and the NMU were in frequent communication in which Commerce hoped to reach a satisfactory resolution of the matter. At the same time, Vantage was required to guard many fronts. It was litigating against the NMU in the district court and filing unfair labor practice charges against the NMU with the NLRB as of February 16, 1971 (1316a). While trying to cooperate with Commerce in the district court action to save the SoCal charter, Vantage was filing charges against Commerce with the NLRB as of February 16, 1971 (1316a) and engaged in the early stages of the commercial arbitration against Commerce as of February 10, 1971 (1316a). Vantage also was apprehensive of a suit by SoCal should it not be able to fulfill its charter (Testimony of Herman S. Nathanson, Commerce President, 809a). And Vantage also was highly conscious of the SIU and the probability of a strike against its other vessels should any arrangement be made concerning the S.S. Barbara which the SIU considered a "subtrafuge"; Howard Schulman, the SIU's attorney, clearly indicated to Vantage that the SIU intended to enforce its rights under the fleetwide rule (707a-726a). Any action by Vantage had to be considered in terms of these various, often inconsistent, objectives.

** Even Judge Frankel noted that because of the deadlines in the contract of sale and the SoCal charter, his decision would be the final one as far as they were concerned. 325 F.Supp. at 366.

judicial economy and efficient judicial resolution of the technical labor law issue raised, argued that any appeal from the Frankel decision be deferred until the NLRB resolved the issue; indeed, if the appeal had been taken, this Court at its own discretion might have followed the same course. At the same time, Vantage vigorously and continuously urged that the NLRB act promptly.* Action by the NLRB was anticipated at any moment, though it was May 24, 1971 before the NLRB complaint was filed in response to the charges filed by Vantage on February 16 at the outset of the litigation. It would have been wholly inconsistent with its approach before Judge Wyatt and Judge Frankel in urging deferral for action by the NLRB for Vantage to have prosecuted an interlocutory appeal without concurrent action by the NLRB.

---

* During this period, Vantage's attorneys met a number of times with attorneys from the NLRB office in New York City to urge prompt action by the NLRB and to assist the NLRB by providing research memoranda, excerpts of legislative history and other materials relevant to the labor issues raised; also, there was a continual flow of correspondence and telephone conversations of similar note. On April 22, 1971, Vantage's attorneys traveled to Washington to NLRB headquarters to meet with NLRB attorneys in an attempt to stimulate timely action. In addition, Commerce's officers and attorneys were involved in a number of meetings with the NLRB in New York and Washington in an effort to obtain prompt action by the NLRB (Testimony of Herman S. Nathanson, Commerce President, 822a-827a).

IV

Vantage may recover from the NMU the $700,000 payment made to Commerce under the equitable remedy of subrogation.

After the sale of the S.S. Barbara was prevented, Commerce obtained a judgment against Vantage for the full amount of the sale price. Subsequently, after further litigation, the two companies settled for a payment of $700,000 by Vantage to Commerce. The sale was prevented by conduct of the NMU violative of the federal antitrust laws, as set out hereinabove, and by a wrongful injunction, as found by the district court. The NMU was thus responsible for the full decline in the value of the S.S. Barbara. Since Vantage was forced to pay $700,000 of this reduction in value, it is entitled to reimbursement of this sum from the NMU under the equitable principle of subrogation. The district court did not find it necessary to consider this issue in view of its other findings.

Subrogation is the principle that when one person has been compelled to pay a debt which ought to have been paid by another, he is given all the creditor's remedies against the debtor. *American Motorists Insurance Company* v. *Snyder*, 63 Misc.2d 690, 313 N.Y.S.2d 200 (Sup. Ct. Niagara Co. 1970). The doctrine includes every instance in which one party pays a debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by the latter, so long as the payment was made either under compulsion or for the protection of some interest of the party making payment,

and in discharge of an existing liability. *Petition of New York Trap Rock Corporation,* 172 F.Supp. 638 (S.D.N.Y. 1959); *Luckenbach* v. *Pedrick,* 116 F.Supp. 268 (S.D.N.Y. 1953), *aff'd,* 214 F.2d 914 (2nd Cir. 1954); *Petition of M.P. Howlett, Inc.,* 75 F.Supp. 438 (E.D.N.Y. 1948). The right of subrogation is not founded on contract and is independent of any contractual relations between the parties. *Memphis & L.R.R. Co.* v. *Dow,* 120 U.S. 287, 7 S.Ct. 482 (1887). Few doctrines are better established than that one who pays the debt of another is entitled to all the rights of the person he paid to enforce his right to be reimbursed. *Pearlman* v. *Reliance Insurance Company,* 371 U.S. 132, 83 S.Ct. 232 (1962). Subrogation is a highly favored remedy and courts are inclined to extend rather than restrict its application. *In re McClancy's Estate,* 182 Misc. 866, 45 N.Y.S.2d 917 (Sup. Ct. Queens Co. 1943), *aff'd,* 268 App. Div. 876, 51 N.Y.S.2d 90 (2nd Dept. 1944), *aff'd,* 294 N.Y. 760, 61 N.E.2d 752 (1945). An insurer who pays damages to an injured party for damages caused by a third party tortfeasor is subrogated to the damaged party's rights. *American Motorists Insurance Company* v. *Snyder, supra.**

In this case, Vantage is subrogated to the rights of Commerce against the NMU to the extent of the $700,000 Vantage paid Commerce for losses suffered as a result of the breach of the contract of sale of the S.S. Barbara caused by the NMU. The arbitration and litigation between Vantage and Commerce resolved rights only as between those two parties. The arbitrators had no authority

* If the insurer pays only part of the debt, he obtains the right of subrogation to the extent he has contributed to payment, after the debt is fully discharged. *In re Yale Express System, Inc.,* 362 F.2d 111 (2nd Cir. 1966).

to bind anyone other than Vantage and Commerce, and no authority to go beyond the scope of the contract of sale. The actions of the NMU were not at issue in the commercial arbitration, and the arbitrators made no rulings with respect to the NMU's actions. Thus, they could not have done more than decide, as between Vantage and Commerce, who was to bear the loss. Vantage, by the decision of the arbitrators, became the insurer of the transaction.

Commerce initially had a right of recovery against Vantage as per their agreement about bearing the loss (as apparently found by the arbitrators), *or* against the NMU under any of the various theories it presently asserts against the NMU, much as an injured party can proceed against either of two joint tortfeasors. The choice of attempting recovery against Vantage was governed by existing circumstances, since the action was begun before the illegality of the restraint-on-trade clause underlying the injunction was fully determined.

Had the NMU not interfered with the transaction, the contract of sale would have been honored. Because the NMU prevented the sale, and prevented it by *illegal* means, the NMU must logically bear complete responsibility for the *full* loss suffered as a result of the decline in value of the S.S. Barbara while the NMU injunction prevented sale, including that portion borne by Vantage. Vantage, to the extent of $700,000, has paid a debt for which the NMU is primarily answerable, and which the NMU in equity and good conscience should have discharged. Vantage made the payment under compulsion, not as a volunteer. It is no matter that there was no contractual relation between

Vantage and the NMU, since the doctrine of subrogation covers every instance in which one pays a debt for which another is primarily answerable.

Vantage's claim against the NMU for its $700,000 payment to Commerce stands on exactly the same footing as Commerce's claim against the NMU for the loss in value of the S.S. Barbara. If Commerce is to recover from the NMU in the instant litigation for the decline in value of the S.S. Barbara ($2,750,000, less $700,000 received on the sale to Plaza Shipping, Inc., less $700,000 paid by Vantage), *under any theory*, Vantage is entitled, under the equitable principle of subrogation, to recover that amount of the decline in value of the S.S. Barbara it has had to bear.

Conclusion

The judgment of the lower court should be reversed and judgment should be granted to Vantage for the full amount of its injuries.

Respectfully submitted,

SURREY, KARASIK, MORSE AND SEHAM
Attorneys for Plaintiff-Appellant
Vantage Steamship Corporation
500 Fifth Avenue
New York, New York 10036
(212) 239-7200

MARTIN C. SEHAM
FRED C. KLEIN
DONALD F. DEVINE
Of Counsel

Service of 2 copies of the
within Brief is hereby
admitted this 23rd day of
July 1976

Signed _____

Attorney for Defendant-Appellee

Service of a copy of the
within BRIEF (2) is hereby admitted
Date: 7-23-76 Time: 1:50
PHILLIPS & CAPPIELLO YR

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906

(5332)